

file

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 30-80:

MTTE TEAMSTERS UNION,
LOCAL NO. 2,

Complainant,

vs.

COUNTY OF MISSOULA
MISSOULA COUNTY AIRPORT,

Defendant.

AMENDED ORDER

* * * * *

Upon application of the parties this matter was remanded to the Board of Personnel Appeals by the Fourth Judicial District on September 3, 1982, directing that a hearing be held to determine the exact amount of money due Robert Moffett under the terms of the Board's final order dated July 24, 1981 and under the terms of the settlement agreement entered into by the parties on November 16, 1981. On October 14, 1982, a hearing was held in Missoula at which Complainant was represented by Mr. D. Patrick McKittrick and Defendant by Mr. Jeremy G. Thane. Mr. Karl H. Bocha appeared on behalf of Wiletta Malone to object to the seniority list contained in the settlement agreement.

ISSUES

During the course of the hearing the parties resolved some of the issues raised concerning Mr. Moffett's claim. They agreed that the following issues were in dispute and should be addressed by the Board.

1. A ruling on the joint petition filed by the parties seeking approval of the settlement agreement.
2. The total amount of back pay due Mr. Moffett.

3. Whether interest should be awarded on the amount due.
4. Whether \$1,851.00 in interim earnings should be deducted from the total due.
5. How the \$2,448.00 received by Mr. Moffett in unemployment compensation during the time he was unemployed should be treated.
6. How much vacation leave is to be credited to his account.
7. Whether Defendant should pay into the Public Employees Retirement System contributions it would have paid for Mr. Moffett during the time in question, and if so, whether the Board should declare that there was no break in service during that time.

FINDINGS OF FACT

Based on the evidence on the record in this matter, I find as follows:

1. The parties stipulated that the period of time with which the issues raised by Mr. Moffett is concerned is from August 3, 1980 through October 31, 1981.
2. The parties stipulated that the gross wages due Mr. Moffett for the above period are \$18,752.60 and that in addition to that amount he is to be paid \$1,000.00 in settlement of his claim for health insurance contributions and premium pay for holidays he might have worked.
3. The parties stipulated that from the gross wages figure of \$18,752.60 there is to be deducted \$2,030.51 for wages already paid by Defendant and \$1,781.53 for wages paid by the Missoula County Sheriff's office.
4. Copies of Robert and Wanda Moffett's U.S. Individual Income Tax Returns received on March 8, 1983 from

1 Internal Revenue Service show the following figures for
2 their wage earnings during 1980 and 1981 (other earnings
3 reported were from interest and rents, no self-employment
4 income was shown):

5 1980

6 \$15,416.00 - total wages reported
7 7,929.95 - wages earned by Robert Moffett through
8 Missoula County (W-2 form)
9 27.50 - wages earned by Robert Moffett through
10 Missoula County (W-2 form)
11 7,459.00 - wages earned by Wanda Moffett through
12 Western Montana Clinic

13 1981

14 \$10,768.00 - total wages reported
15 110.50 - wages earned by Robert Moffett through
16 Missoula County (W-2 form)
17 1,197.00 - wages earned by Robert Moffett through
18 Missoula County (W-2 form)
19 11,441.56 - wages reported on W-2 form but which
20 Robert Moffett refused to accept from
21 the Airport Authority and so noted on
22 his 1981 income tax return
23 9,460.94 - wages earned by Wanda Moffett through
24 Western Montana Clinic

25 5. The \$1,051.00 claimed by Defendant as an offset to
26 back pay due Mr. Moffett was not earned by him and, there-
27 fore, may not be deducted from the wages due.

28 6. The parties agree that interest on the back pay
29 should be awarded pursuant to the Board's policy.

30 7. During the period of time pertinent to this issue
31 Mr. Moffett received \$2,448.00 in unemployment insurance
32 compensation.

1 8. The parties agreed that 15 days sick leave would
2 be credited to Mr. Moffett's account to cover the period
3 from August 3, 1980 through October 31, 1981.

4 9. Had he not been terminated, Mr. Moffett would have
5 earned vacation leave at the rate of 1.25 days for August
6 1980 through October 1981 for a total of 18.75 days (15
7 months x 1.25).

8 10. During the period August 1980 through October
9 1981, Defendant would have made regular payments into the
10 Public Employees Retirement System on Mr. Moffett's behalf.
11 Those payments would have included its own share and Mr.
12 Moffett's share deducted from his pay as required by law.

13 11. Had Mr. Moffett not been terminated he would not
14 have had a break in service with Defendant and his retire-
15 ment benefits under PERS would not have been disturbed.

16 ANALYSIS

17 There is no dispute between the parties over whether
18 interest should be awarded since the Board has in fact
19 recently announced its policy in that regard and since
20 Defendant acknowledged that interest should be given, if
21 that was Board policy. The interest calculation is set
22 forth further herein. See WLP 3-79, Bruce Young vs. City of
23 Great Falls, decided by the Board of Personnel Appeals March
24 4, 1983. The parties do not disagree over the matter of
25 employer and employee contributions to the Public Employees
26 Retirement System (PERS). They agree that the employer
27 should withhold from back pay the amount Mr. Moffett would
28 have contributed, combine that with the amount the employer
29 would have contributed and forward the total to PERS.
30 Further, both parties urge the Board to approve their settle-
31 ment agreement. On the remaining issues the parties are not in
32 agreement.

1 At the hearing on October 14, 1982, Mr. McKittrick and
2 Mr. Thane agreed that the following issue was relevant and
3 should be addressed by the Board: Whether the settlement
4 agreement entered into by the parties for the purpose of
5 resolving the pending unfair labor practice case should be
6 approved.

7 Mr. Karl Boehm, representing Wiletta Malone, also ap-
8 peared at the hearing and spoke against the approval of the
9 settlement agreement alleging that paragraph two thereof con-
10 cerning seniority had been reached in an arbitrary or capri-
11 cious manner which injured Mr. Malone. He submitted a brief
12 in support of his position.

13 There is an issue over the propriety of the settlement
14 agreement; however, there are not sufficient facts on the
15 record at this time to reach a conclusion concerning whether
16 Ms. Malone or any other person affected by the agreement has
17 a valid claim. This, of course, involves the larger issue
18 of whether the settlement agreement comports with the make
19 whole order issued by the Board in this case. Therefore, at
20 this time, it would be inappropriate to either approve or
21 disapprove the parties' agreement. Since the Board has been
22 put on notice that a claim has been made against the agree-
23 ment, it cannot be acted upon without a resolution of the
24 factual allegations and legal implications raised by Mr. Boehm.

25 The parties' dispute relative to the number of days
26 credit to be given to Mr. Moffett's vacation leave records
27 centers around whether he would have taken 15 days vacation
28 during the period from August 1, 1980 through August 1, 1981
29 and was, therefore, compensated for those days as a part of
30 gross wages. Complainant argues that he is entitled to be
31 credited with the full 15 days, plus 3 3/4 days for the
32 period August 1, 1980 through October 31, 1981 for a total

1 of 18 3/4 days. There is nothing under those sections of
2 the law dealing with vacation leave for public employees
3 which requires that leave earned be used within the period
4 in question here. On the contrary, Section 2-18-617 MCA
5 allows an employee to accumulate up to two times the maximum
6 earned annually. No leave is forfeited if it is used within
7 90 days from the last day of the year in which it accrued.
8 If Mr. Moffett had been employed by Defendant during the
9 period in question, he could have elected to accumulate his
10 vacation leave. To allow him credit for those days now
11 appears reasonable, for to deny him these credits would
12 require that the Board assume he would have taken 15 days of
13 vacation during the period. He should be credited with a
14 total of 18 3/4 days vacation.

15 Based on the finding in No. 5 above, the contention of
16 the Employer that \$1,051.00 be deducted from Mr. Moffett's
17 gross wages for the period relevant here must be rejected.
18 There is nothing shown on his tax returns to indicate he
19 earned such amount.

20 Another area of dispute in this matter is: how should
21 the \$2,448.00 received by Mr. Moffett in unemployment com-
22 pensation be treated? The Employer contends that he is not
23 entitled to full pay for the period and the unemployment
24 compensation. They believe that the Employer should either
25 be credited with the \$2,448.00 in the form of an offset to
26 the gross wages due or that Mr. Moffett should be required
27 to reimburse the State for the unemployment he received.
28 Complainant's position is that unemployment compensation is
29 not a proper deduction from back pay due, that the matter is
30 between the State and Mr. Moffett as to whether he must make
31 reimbursement. The National Labor Relations Board has a
32

1 long history of disallowing unemployment compensation re-
2 ceived by a discriminatee to reduce back pay. In NLRB v.
3 Gullett Gin Co., 340 U.S. 361, 71 S.Ct. 337, 27 LRM 2230
4 (1951), the U.S. Supreme Court, in upholding the NLRB posi-
5 tion, reasoned that unemployment benefits are not direct
6 benefits, but rather collateral benefits and since consider-
7 ation is not given to collateral losses, none should be
8 given to collateral benefits. See also Winn-Dixie Stores,
9 Inc., 413 F.2d 1008, 71 LRM 3003 (CA5 1969); Sioux Falls
10 Stock Yards Co., 236 NLRB 543, 99 LRM 1316; Cal-Pacific
11 Furniture Mfg. Co., 231 NLRB 1244, 91 LRM 1059 (1975);
12 Hopcroft Art & Stained Glass Works, Inc., 258 NLRB 190, 106
13 LRM 1237 (1961); Higgins v. Harges, 644 F.2d 1348, 107 LRM
14 2438 (CA9 1981). In Bruce Young, supra, the Board of Person-
15 nel Appeals stated that unemployment compensation benefits
16 are not to be used as an offset against back pay.

17 The only remaining issue is that of interest. The
18 parties agreed that the gross wages due are \$18,752.60 and
19 from that amount a total of \$3,812.04 (\$2,030.51 and
20 \$1,781.53) should be deducted as wages already paid. That
21 leaves a total of \$14,940.56 in back pay due for the period
22 August 3, 1980 through October 31, 1981. The additional
23 \$1,080.00 agreed upon as the settlement for Mr. Moffett's
24 claim for health insurance premiums and premium pay for
25 holidays has been included in the amount upon which interest
26 has been calculated below giving a total of \$15,940.56.

27 The Board of Personnel Appeals recently decided to adopt
28 the method of computing interest on back pay that is used by
29 the NLRB. Bruce Young, supra; Florida Steel Corp., 231 NLRB
30 651, 96 LRM 1070 (1977); North Cambria Fuel Co. v. NLRB,
31 107 LRM 2140 (CA3 1981). The method entails the use of the
32 Internal Revenue Service's adjusted prime interest rate,

1 which is the rate charged or paid by the IRS for federal tax
2 purposes. It is a rate fixed by the Secretary of Treasury
3 not more often than every six months to reflect money market
4 changes and is defined as 90 percent of the average predomi-
5 nant rate quoted commercial banks to large businesses,
6 rounded to the nearest full percent. The Board also decided
7 to use the quarterly method of computing back pay as set
8 forth by the NLRB in F. W. Woolworth Co., 26 LRRM 1183, 90
9 NLRB 289 and approved by the U.S. Supreme Court in NLRB v.
10 Seven-Up Bottling Co., 244 U.S. 344, 73 S.Ct. 287, 31 LRRM
11 2237 (1953).

12 In the instant case the exact amount Mr. Moffett would
13 have earned in each of the 5 quarters from August 3, 1980
14 through October 31, 1981, is not in evidence because the
15 parties stipulated to a gross amount for the entire period.
16 The method used below to make the monthly computation for
17 the purpose of arriving at interest due was to divide the
18 total amount due (\$15,940.56) by the 15 months and then
19 multiply that quotient (\$1,062.704) by the number of compen-
20 sable months in each quarter (months he would have worked)
21 to determine the net amount (principal) due as of the end of
22 each quarter. The net amount by quarter multiplied by the
23 interest rate yields interest due as of June 30, 1983 by
24 quarter. Interest due beyond that date will have to be
25 computed at the end of each succeeding quarter, should it be
26 necessary. Thus, by setting a prospective pay-off date of
27 June 30, 1983 the amount of interest is computed as follows:

QTR. ENDING	RATE PER MONTH	x	COMPENSABLE MONTHS	=	NET AMOUNT	x
9-30-80	\$1,062.704		2 (Aug., Sept.)		\$2,125.41	
12-31-80	"		3		3,188.11	
3-31-81	"		3		3,188.11	

<u>QTR.</u> <u>ENDING</u>	<u>RATE PER</u> <u>MONTH</u>	<u>x</u>	<u>COMPENSABLE</u> <u>MONTHS</u>	<u>=</u>	<u>NET</u> <u>AMOUNT</u>	<u>x</u>
6-30-81	"		3		3,188.11	
9-30-81	"		3		3,188.11	
12-31-81	"		1 (Oct.)		1,062.71	
					<u>\$15,940.56</u>	

<u>INTEREST</u> <u>RATE*</u>	<u>=</u>	<u>INTEREST</u> <u>DUE 6-30-83</u>	<u>WAGES</u> <u>DUE 6-30-83</u>
43%		5 913.93	
40%		1,275.24	
37%		1,175.60	
34%		1,083.96	
31%		988.31	
28%		297.56	
		<u>\$5,738.60</u>	<u>\$15,940.56</u>

*The NLRB Regional Office in Seattle reported the following adjusted prime interest rates it used to compute back pay award interest in the private sector: 1980 - 12%; 1981 - 12%; 1982 - 20%; 1983 - 16%. To determine simple interest the NLRB prorates the annual interest rate according to the number of quarters interest would have been earned on the wages due, then applies that aggregate rate ($\frac{1}{4}$ of 12% + 12% + 20% + $\frac{1}{4}$ of 16% in this case) to the amount the employee would have earned, minus any interim earnings, as of the end of the first quarter after termination. To compute interest due on wages which would have been paid in subsequent quarters, the first rate (43% here) is reduced by one-fourth of the amount of the adjusted prime rate in effect at the time (12% x .25 = 3% here).

In summary, the amount due Mr. Moffett, as of the stated pay-off date, is \$15,940.56 in back pay and \$5,738.60 in interest.

CONCLUSION OF LAW

Robert Moffett is entitled to back pay and the restoration of other benefits which he would have earned but for the Employer's violation of his rights under Title 39, Chapter 31, MCA.

ORDER

IT IS ORDERED that Defendant, County of Missoula and Missoula County Airport take the following affirmative

1 action to make Robert Moffett whole under the terms of the
2 Final Order of the Board of Personnel Appeals dated July 24,
3 1981 and under the terms of the settlement agreement dated
4 November 15, 1981;

5 1. Tender to him back pay in the amount of \$5,738.60
6 as interest and \$15,940.56 (less the amount the Employer
7 would have deducted for Mr. Moffett's contribution to PERS,
8 Social Security and other such regular mandatory deductions)
9 as wages.

10 2. Deduct from his wages due and deposit with the
11 Montana Public Employees Retirement System that amount which
12 would have been deducted had there been no break in service
13 from August 3, 1980 through October 31, 1981, along with the
14 amount the Employer would have contributed.

15 3. Credit to his vacation leave account 18 3/4 days
16 of vacation time for the period August 3, 1980 through
17 October 31, 1981.

18 4. Credit to his sick leave account 15 days of sick
19 leave for the period August 3, 1980 through October 31,
20 1981.

21 Dated this 21st day of April 1983.

22 BOARD OF PERSONNEL APPEALS
23

24
25 By: 
26 Jack H. Callhoun
27 Hearing Examiner
28
29
30
31
32